

APPENDIX A

CLD-013

October 12, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-2382

UNITED STATES OF AMERICA

VS.

JOHN NAPOLI, a/k/a JUNIOR,

John Napoli,
Appellant

(E.D. Pa. Crim. No. 2-07-cr-00075-001)

Present: CHAGARES, GREENAWAY, JR. and GREENBERG, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

MMW/BWM/clw

ORDER

Appellant must obtain a certificate of appealability to appeal the denial of his motion filed pursuant to Federal Rule of Civil Procedure 60. See Wilson v. Sec'y Pa. Dep't of Corr., 782 F.3d 110, 115 (3d Cir. 2015); Morris v. Horn, 187 F.3d 333, 340-41 (3d Cir. 1999). Jurists of reason would agree that the District Court properly construed Appellant's motion filed pursuant to Rule 60 as an unauthorized second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. See Gonzalez v. Crosby, 545 U.S. 524, 532 (2005) (reasoning that a motion attacking the federal habeas court's previous disposition of a claim on the merits is not a proper Rule 60 motion, while a motion attacking "some defect in the integrity of the federal habeas proceedings" is a proper Rule 60 motion); United States v. Arrington, 763 F.3d 17, 22 (D.C. Cir. 2014) (applying analysis in Gonzalez to 28 U.S.C. § 2255 motions). Appellant's motion, although invoking the language of Rule 60, effectively challenged the denial of § 2255 relief on the merits using new evidence, rather than the manner in which the District Court previously decided the original § 2255 motion. The District Court therefore lacked jurisdiction to consider Appellant's Rule 60 motion, see Magwood v. Patterson, 561 U.S.

320, 331 (2010), and jurists of reason would agree that the District Court was correct to dismiss it, see Slack v. McDaniel, 529 U.S. 473, 484 (2000). To the extent that Appellant's filing could have been construed as a proper Rule 60 motion, it would have been time-barred, see Fed. R. Civ. P. 60(c)(1), and there is no sufficient basis for equitable tolling in the record because Appellant did not act diligently to pursue Rule 60(b) relief after he says he learned of the purportedly new evidence, see Holland v. Florida, 560 U.S. 631, 649 (2010). Consequently, the foregoing request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2).

By the Court,

s/Michael A. Chagares
Circuit Judge

Dated: January 18, 2018
CLW/cc: Andrea G. Foulkes, Esq.
Mr. John Napoli



A True Copy:

Patricia S. Dodszeuweit

Patricia S. Dodszeuweit, Clerk
Certified Order Issued in Lieu of Mandate

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
JOHN NAPOLI	:	NO. 07-75-1

ORDER

AND NOW, this 6th day of June, 2017:

(1) to the extent that the motion of petitioner John Napoli "to re-open 28 U.S.C. § 2255 proceedings pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure"

(Doc. # 466) is a second or successive petition, it is hereby ORDERED that the said motion is DISMISSED without prejudice to the right of the petitioner to move in the United States Court of Appeals for the Third Circuit for an order authorizing this court to consider the application. See 28 U.S.C. § 2244; and

(2) to the extent that the motion is not a second or successive petition under 28 U.S.C. § 2255 but is instead brought pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure, it is hereby ORDERED that the said motion is DISMISSED as time-barred. See Fed. R. Civ. P. 60(c)(1).

BY THE COURT:

/s/ Harvey Bartle III

J.